

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ZITO CANTON, LLC,

Complainant,

v.

PENNSYLVANIA POWER & LIGHT
COMPANY,

Respondent.

Proceeding No. 17-284

File No. EB-17-MD-005

OPPOSITION TO MOTION TO DISMISS

Zito Canton, LLC (“Zito”), by its attorneys and pursuant to Section 1.727(c) of the rules of the Federal Communications Commission (“Commission”), files this Opposition to the Motion to Dismiss Pole Attachment Complaint filed by PPL Electric Utilities Corporation (“PPL”) in the above captioned proceeding. Zito opposes the motion on the following grounds.

First, PPL’s motion is not authorized by Commission rules. PPL states that its motion is filed pursuant to Section 1.41 and 1.1404(d) of the Commission’s rules. However, Section 1.41 pertains to informal requests for Commission action, not motions. Likewise, Section 1.1404(d) is a substantive rule that does not authorize the filing of a motion. In fact, the Commission rule governing responsive pleadings in Commission pole attachment complaint proceedings, Section 1.1407(a), provides only for a response and a reply and states, “Except as otherwise provided in §1.1403, **no other filings and no motions** other than for extension of time will be considered

unless authorized by the Commission.” 47 C.F.R. § 1.1407(a) (emphasis added). The pleadings authorized in Section 1.1403 relate to an attachers request for temporary stay, which is not at issue here. PPL’s motion does not indicate that it sought or obtained the required authorization from the Commission to file its motion. Unless PPL obtained such authorization, PPL’s motion is barred by the Commission’s rules and must be stricken.

Second, Section 1.1406 of the Commission’s rules sets forth the standards for Commission dismissal of pole attachment complaints. Subsection (b) provides that a complaint will be dismissed if it “does not contain *substantially all* the information required under §1.1404.” 47 C.F.R. § 1.1406 (emphasis supplied). Section 1.1404(d) specifically contemplates that attachers may not have copies of pole attachment agreements to include with complaints, in which case other information may be provided in lieu of attaching the agreement. *See* 47 C.F.R. 1.1404(d). In this case, Zito’s complaint includes all of the other information required by Section 1.1404 and thus meets the rule’s substantiality test. Specifically, the complaint includes: the identification and contact information required by Section 1.1404(a); the certification required by Section 1.1404(b); a statement that Pennsylvania has not certified as required by Section 1.1404(c); a statement that PPL owns or controls poles and uses such poles in whole or in part for wire communications, and that Zito attaches to PPL poles as required by Section 1.1404(d); specific statements concerning PPL’s pole attachment conditions which are claimed to be unjust and unreasonable as required by Section 1.1404(e); and the information relied upon necessary to justified said claim as required by Section 1.1404(f).

Indeed, Zito’s complaint includes all of the information necessary to address Zito’s claims relating to PPL’s unreasonable application review and pre-attachment survey process and PPL’s failure to provide sufficient billing detail to verify charges for that process, PPL’s

unlawful conditioning of access on payment of disputed pre-construction survey charges, PPL's unreasonable and unsubstantiated make-ready cost estimates, and PPL's attribution of costs to Zito to correct pre-existing non-compliance.¹ Nothing in PPL's motion suggests that anything in the parties' pole attachment agreement would resolve Zito's claims in this regard. In fact, Zito's complaint includes only *one* allegation related to PPL's failure to adhere to its own pole attachment agreement; the remainder of the allegations concern PPL's actual practices, including its denial of access unless Zito agrees to pay all of its unreasonable survey charges.² To the extent that PPL seeks to advance an argument that another legally enforceable agreement supports its unjust and unreasonable actions as alleged by Zito, it has the opportunity, and it is only appropriate, to do so in its response to Zito's complaint, not in an unauthorized motion.

PPL makes much of the fact that the alleged more current agreement, which is described in part but not attached to its motion, includes a different provision governing pre-construction inspections. However, as set forth above, this only goes to one allegation in Zito's complaint. Moreover, the fact that new inspection provisions may be included in the agreement would not preclude Zito from challenging the inspection terms and conditions as unreasonable under the Commission's longstanding "sign and sue" rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement. *See Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 ¶¶ 119, 125 (2011).

Third, PPL's unauthorized motion is particularly egregious given that it refused to respond to Zito's written requests for a copy of the parties' pole attachment agreement before the complaint was filed. Specifically, in emails to Jose Silverio, PPL Support Engineer, Zito's

¹ See Pole Attachment Complaint in Proceeding No. 17-284 (filed 10/12/2017) ("Complaint") at ¶¶ 14-56.

² See Complaint at ¶ 60.

Commercial Services Project Manager, Kelly Ragosta, on September 1, 2017 and again on September 19, 2017, requested a copy of the agreement.³ PPL never responded to her requests.⁴ An attacher's failure to include with its complaint information requested of and not provided by the utility pole owner should not form the basis of a dismissal. Indeed, the Commission's rules recognize the injustice that would be wreaked by such a result in Section 1.1404(j) of its rules, which provides, "No complaint filed by a cable operator or telecom carrier shall be dismissed where the utility has failed to provide the [rate] information required under paragraphs (g), (h) or (i) of this section, as applicable, after such reasonable request. ... If the utility did not supply these pages to the cable television operator or telecommunications carrier in response to the information request, the utility shall supply this information in its response to the complaint." As is the case when pole owners refuse to provide requested rate information, PPL should be required to raise the issues presented by the alleged more current attachment agreement in its response.

Finally, without an actual copy of the agreement, which presumably easily could have been, but was not, appended to PPL's motion, it is impossible to discern whether in fact the alleged later dated agreement actually governs and displaces the earlier agreement between PPL's and Zito's predecessors. Zito does not have a copy of this agreement⁵ nor was it raised as a defense by PPL during the parties' mediation before the Commission last year concerning the very same issues raised in the Complaint.⁶ PPL's vague allegations that the agreement has

³ See Attachment A, Declaration of Kelly Ragosta dated November 6, 2017 ("Ragosta Decl.") ¶¶ 2-4 & Exhs. 1 & 2.

⁴ *Id.*

⁵ *Id.* at ¶ 5.

⁶ The mediation, initiated by a request filed by Zito dated June 20, 2016 was before the Commission Enforcement Bureau, Market Disputes Resolution Division.

significant and different provisions that are somehow relevant to the dispute, without more, do not warrant dismissing the Complaint.

Clearly, the only entity that stands to benefit from a dismissal (or even delay) of the Complaint is PPL – the same entity that declined to provide the requested documentation to Zito or even attach the document to its unauthorized Motion. Rather than dismiss the Complaint, Zito respectfully submits that PPL should be directed to provide Zito and the Commission with a copy of the agreement immediately and to raise any arguments concerning the applicability of the agreement in its scheduled responsive pleading, just as the rules dictate when a pole owner fails to provide an attacher with requested rate information.

For the foregoing reasons, PPL's motion to dismiss should be stricken or, in the alternative, denied.

Respectfully submitted,

Zito Canton, LLC

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Zito Canton, LLC

Date submitted: November 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I caused a copy of the foregoing Opposition to Motion to Dismiss and declaration in support thereof to be filed with the Commission via ECFS and served on the following (service method indicated):

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